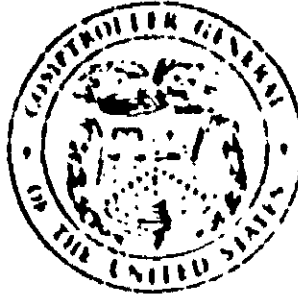


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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-204531, B-204531.2

DATE: February 4, 1982

MATTER OF: South Jersey Clothing Co.; Catania
Clothing Corp.

DIGEST:

1. Failure of bidder to supply information in bid as to eligibility of bidder for evaluation preference as labor surplus area concern does not affect responsiveness of bid.
2. Where bidder fails to provide labor surplus area (LSA) concern eligibility information in LSA concern eligibility part of bid but elsewhere in bid inserts place of performance establishing fact that substantial portion of contract will be performed in an LSA, failure to provide information in LSA concern eligibility clause may be waived as minor informality.

South Jersey Clothing Co. (South Jersey) and Catania Clothing Corp. (Catania) each protest any award to the other firm under Defense Personnel Support Center invitation for bids (IFB) No. DLA100-81-B-1115, a total small business and labor surplus area (LSA)/small business set-aside.

The IFB imposed a 5-percent evaluation factor on non-LSA concerns. The agency proposes to award to Catania, the low bidder, since neither it nor South Jersey, the second low bidder, is considered an LSA concern for the procurement, and the 5-percent evaluation has no effect.

Because we conclude that Catania is an LSA concern, and therefore not subject to the 5-percent penalty, South Jersey's protest is denied and Catania's protest is sustained. Therefore, we need not consider South Jersey's contention that, since it is an LSA concern and Catania is not--thereby requiring the addition of a 5-percent penalty to the Catania bid price--South Jersey is the low evaluated bidder.

South Jersey contends that the Catania bid is nonresponsive because Catania failed to complete invitation clause K17, "Eligibility for Preference as a Labor Surplus Concern." Even if the Catania bid is considered responsive, South Jersey contends that the Catania bid price should have the 5-percent evaluation (non-LSA concern) differential added for failure to complete clause K17.

Clause K17 contained the following direction:

"Each offeror desiring to be considered for award as a Labor Surplus Area (LSA) concern on the set-aside portion of the procurement, specified elsewhere in the schedule, shall indicate below the address(es) where costs incurred on account of manufacturing or production (by offeror or first tier subcontractor) will amount to more than 50% of the contract price.

"Name of Company:

"Street Address:

"City/County/State:

"Percentage:

"(If more than one location is to be used, list each location and the costs to be incurred at each, stated as a percentage of the contract price).

"CAUTION: FAILURE TO LIST THE LOCATION OF MANUFACTURE OR PRODUCTION AND THE PERCENTAGE, IF REQUIRED, OF COST TO BE INCURRED AT EACH LOCATION WILL PRECLUDE CONSIDERATION OF THE OFFEROR AS AN LSA CONCERN.

"NOTE: IT IS IMPERATIVE THAT INFORMATION REQUIRED BY THE ABOVE CLAUSE BE SUBMITTED WITH THE OFFER IF LABOR SURPLUS ELIGIBILITY IS BEING CLAIMED."

IF REQUIRED, OF COST TO BE INCURRED AT EACH LOCATION WILL PRECLUDE CONSIDERATION OF THE OFFEROR AS AN LSA CONCERN.

"NOTE: IT IS IMPERATIVE THAT INFORMATION REQUIRED BY THE ABOVE CLAUSE BE SUBMITTED WITH THE OFFER IF LABOR SURPLUS ELIGIBILITY IS BEING CLAIMED."

First, the clause K17 information is required to establish the bidder's status for possible LSA preference in bid evaluation, not to evaluate responsiveness. See Sunroc Corporation, B-184988, January 29, 1976, 76-1 CPD 62.

Second, in clause K39, "Place of Performance," Catania listed its own plant at 85 Fifth Avenue, New York, New York 10003, as being the location at which the entire contract would be performed. The Department of Labor listing of eligible labor surplus areas contains the Catania place of performance. The clause prohibited performance at any other place unless approved by the contracting officer.

In a recent decision, we held that the failure to complete clause K17 was not waivable because the place at which the bidder will perform may be immaterial with respect to the determination of whether the bidder is an LSA concern since costs greater than 50 percent of the contract price may be incurred in non-LSA areas for subcontracting or the purchase of materials. Therefore, the bidder was not committed to incur costs at that location amounting to more than 50 percent of the contract price. See Chem-Tech Rubber, Inc., B-203374, September 21, 1981, 81-2 CPD 232.

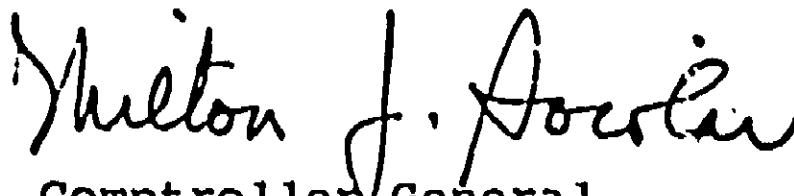
However, the facts here excuse the failure to complete clause K17. The invitation is for the procurement of coats. The cloth and buttons for the coats will be supplied to the contractor as Government-furnished material. Consequently, we presume that a substantial portion of the contract costs will be for labor, and Catania's offer to perform 100 percent of the work at its listed facility in an eligible LSA offered the commitment for performance by an LSA concern. In

these circumstances, the information called for by clauses K17 and K39 was essentially the same.

The agency argues that contract performance will involve various costs, other than the labor costs of manufacturing or production, which may or may not be incurred in LSA areas. To consider Catania an LSA concern, according to the agency, would establish an intolerable and impossible burden on contracting officers in deciding whether or not, on each of thousands of items, more than 50 percent of the contract price would be incurred by costs at the bidder's end item manufacturing facility.

While we appreciate the agency's concern, several factors support our conclusion. The service nature of this procurement leads to the reasonable conclusion that the requisite costs will be performed by an LSA concern. Furthermore, so long as the bid evidences a commitment for performance by an LSA concern, information such as cost breakdowns and location identification may be submitted after opening as matters of responsibility or eligibility. See Chem-Tech Rubber, Inc., supra; Uffner Textile Corporation, B-205050, December 4, 1981, 81-2 CPD 443. Finally, we presume that the failure to complete clause K17 occurs infrequently. However, because clauses K17 and K39 call for repetitive information where the procurement is for labor, we are recommending that future solicitations eliminate the possible confusion to bidders.

Accordingly, the South Jersey protest is denied, the Catania protest is sustained, and the Catania bid may be evaluated on the basis that Catania is an LSA concern.



Acting Comptroller General
of the United States